UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF ADMINISTRATIVE LAW JUDGES

O'NEILL ASSET MANAGEMENT, LLC

Respondent

and **Case 07-CA-352673**

SHAY BARBER, AN INDIVIDUAL

Charging Party

COUNSEL FOR THE GENERAL COUNSEL'S BRIEF TO THE ADMINISTRATIVE LAW JUDGE

Patricia A. Fedewa
Counsel for the General Counsel
National Labor Relations Board
Region Seven
477 Michigan Avenue, Room 05-200
Detroit, MI 48226
Telephone: (313) 335-8053
Facsimile: (313) 226-2090
E-Mail: Patricia.Fedewa@nlrb.gov

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I. INTRODUCTION

Counsel for the General Counsel (CGC) Patricia A. Fedewa respectfully submits this brief[1] to Administrative Law Judge (ALJ) Arthur J. Amchan, who heard this case on July 14, 2026, in Detroit, Michigan.

Respondent is a financial services firm located in Grand Rapids, Michigan. The complaint alleges that Respondent violated Section 8(a)(1) of the National Labor Relations Act (the Act) by: maintaining employment agreements containing an overbroad confidentiality clause; instructing employees not to discuss workplace issues with each other; and discharging Charging Party Shay Barber on August 26, 2024[1] due to his protected concerted activity. CGC requests all relief described in the complaint.

II. STATEMENT OF FACTS

A. Charging Party Shay Barber Works for Respondent

Respondent is a financial services firm. (GC 1(h), p 2[2]) Respondent hired Barber on about May 30, 2023 as an operations assistant. (Tr 98, 100; GC 14) Barber reported to Respondent President Andrew O'Neill and Director of Operations Josh Wills.[3] (Tr 100; GC 1(h), p 3) At the time of Barber's August 26 discharge, Respondent employed about seven employees. (Tr 186) During Barber's initial interview with O'Neill, they agreed that Barber could work a flexible schedule where he would be able to make up hours missed outside of Respondent's regular business hours (9:30 a.m. to 6:00 p.m.) due to coaching high school

[1] All dates are in 2024, unless otherwise noted.
[2] References to the record will appear as follows: (Tr __) refers to a specific page of the trial transcript. (GC__) and (O __) refer to General Counsel and Respondent's exhibits, respectively.
[3] Respondent has admitted that O'Neil and Wills are supervisors. (GC 1(h), p 3)

basketball.. (Tr 101)

B. Respondent Issues Barber a PIP in Retaliation for Supporting Bridget Hendrick's Work Issues

In about the end of March, Respondent hired Bridget Hendrick as an assistant to Lead Advisor Michael Potter.[4] (Tr 14) On May 23, O'Neill chastised Hendrick for not answering the phone before business hours, stating "[e]nough with the back and forth; you just need to pick up the phone." (Tr 15, 25, 101-102) Before the staff meeting that afternoon, Hendrick and her coworkers discussed O'Neill's behavior toward the staff and the morning interaction between her and O'Neill. (Tr 15) The employees discussed O'Neill's lack of respect for and belittlement of employees and how these incidents like what happened between Hendrick and O'Neill needed to stop. (Tr 17, 103) The employees decided to bring up the issue during the staff meeting. (Tr 17) Staff meetings included open discussions. (Tr 142) The employees discussed that Barber should speak the least at the staff meeting because he had previously brought up work concerns with O'Neill more than any other employees. (Tr 103)

Toward the end of the staff meeting, Hendrick brought up the phone incident between her and O'Neill. (Tr 18, 104) Hendrick said she did not feel comfortable with what happened; that it was unprofessional; that she felt unsafe; and that she wanted to talk about it in the staff meeting. (Tr 104) O'Neill responded that there was a time and a place and that he would speak with her one-on-one and/or with Lead Advisor Potter present, but not in the meeting. (Tr 104) O'Neill said that Hendrick cannot demand when and where they meet to talk about the issue. (Tr 104) When O'Neill and Hendrick began to yell at each other, Barber and other employees stepped in between them. (Tr 104) Hendrick stated that she needed to be heard. (Tr 18, 26) O'Neill stated that he was disappointed in her and thought he could trust her. O'Neill then said the meeting

[4] Respondent has admitted that Potter is a supervisor (GC 1(h), p 3)

needed to end because he had clients coming. (Tr 18) Barber told O'Neill that they had tried to bring these things to light before and nothing happened. O'Neill told Barber that he did not have a self-employed mindset. (Tr 105) Barber did not respond choosing to let the situation deescalate because there were clients in the next room. (Tr 105, 135)

At about 1:00 p.m. on May 24, Hendrick sent the following Teams message to the entire staff:

> "I am heading out. I am not feeling well. Michael and Andrew, I want to reiterate that I will not be meeting with the two of you alone because I feel uncomfortable and unsafe. I will only discuss these items with the entire OAM team present (Josh, Shay, Miguel, Jake). Since I don't think it is necessary for the guys to have to come in an extra day they were not planning on, I believe we can discuss this item during our normal team meeting on Thursday or Friday. What better place to talk through concerns we have than with the whole team. I will also not be responding to messages when I am not working. So do not contact me." (GC 5)

Twenty-five minutes later, O'Neil responded in the Teams chat to the entire staff:

> "Sorry you do not feel well!
> It will not be discussed at our team meeting as that is part of the issue. You do not have the authority to tell Michael or I how to handle these matters. We are all for constructive feedback, but you always voice concerns *(sic)* up... Not laterally. You need to respect him and I in that matter. That is final. You need to be able to talk with and communicate with your team lead to be part of our team…that isn't negotiable.
> Please do not message on this thread regarding that or you'll be removed from it.
> It's toxic, and we will not stand for it." (GC 5)

On May 28, Hendrick resigned from her position because she "didn't feel comfortable continuing to work there." Hendrick did not feel comfortable "because of the way that [O'Neill] responded to the concerns brought to him." (Tr 20)

In late May, shortly after the staff meeting referenced above, O'Neill, Potter, and Sarah O'Neill (wife of Andrew O'Neill) presented Barber with a performance improvement plan (PIP). (Tr 106; GC 6) O'Neill stated that Director of Operations Wills was not present in the meeting because he did not approve of the PIP because it was not based on Barber's performance. (Tr

106) O'Neill then explained that he felt cornered at the staff meeting; that it was unprofessional and that Barber was unprofessional. Barber responded that he was not sure how he was unprofessional in the meeting. (Tr 106) Barber then told O'Neill that he thought that the purpose of the PIP was to "put a muzzle" on Barber and to prevent him from speaking up about workplace issues. (Tr 107) Barber told O'Neill that the PIP could not be based on performance because Wills had just given him a performance review with the highest rating supported by explanations.[5] (Tr 107, 137-138)

The PIP stated that the "plan for satisfactory performance" included: (1) "Passing negatives up and positives around (zero tolerance moving forward);" (2) "Demonstrating professionalism in conversions with other team members and the president/owner;" and (3) "Following procedures on how to file a complaint or raise a concern." (GC 6) The PIP further provided that "improvement objectives/indicators needing improvement" included "Following our core values (No Gossip and Self-Employed Mentality)." Finally, the PIP provided that Respondent would monitor Barber's progress through August 28 (three months from issuance date of PIP). (GC 6)

Shortly after the PIP meeting, O'Neill met with Barber and Potter regarding how to raise a complaint or concern. (Tr 108-109; GC 8) After noticing that the process provides for the complaints to go to O'Neill, Barber asked O'Neill what happens when the complaint is about O'Neill. (Tr 108) O'Neill did not have an answer. (Tr 108)

C. Barber Speaks with Dykstra

On August 21, Benjamin Dykstra began working for Respondent in client relations – most notably, Dykstra interfaced with clients regarding new business. (GC 51) On August 23,

[5] Respondent has indicated that it did not know why Barber's written performance review was not in his personnel file despite Wills having submitted it to O'Neill. (Tr 94, 107-108)

after hearing O'Neill state that employee Miguel Arjona-Rodriguez was blaming Dykstra for an error on a client matter, Barber came to Dykstra's office. (Tr 110) Barber told Dykstra that he overheard conversations between Dykstra and O'Neill and Rodriguez. Barber noted that O'Neill was placing blame on Dykstra for the error and it was not true. (Tr 110) Barber explained to Dykstra that it was a common theme for O'Neill to pit employees against each other and that Dykstra should be careful. (Tr 54, 110)

Barber warned Dykstra about the difficulties of working with O'Neill. (Tr 52, 75) During their August 23 conversation in Dykstra's office, they discussed business processes and how in their respective positions, they could work together. According to Dykstra, Barber was frustrated with his own progress and the progress of other employees working for Respondent. (Tr 52) Barber warned Dykstra that the arrangement that Dykstra was hoping to pursue about commissions would likely not work out. (Tr 52-53) Barber cautioned Dykstra that O'Neill would not listen to new ideas and that when Barber and other employees brought up ideas to O'Neill, they were immediately shut down. (Tr 52-54, 110-111)

Dykstra noted that Barber was asserting that O'Neill was greedy. (Tr 52, 76) Barber told Dykstra to be cautious of false promises from O'Neill regarding Respondent's annual meetings that would come with raises. (Tr 111) Barber warned that O'Neill would push raises off for months and months. (Tr 111) Barber explained that O'Neill takes the bulk of the profit-sharing plan and that Barber had only received about $85 in profit sharing during the previous year. (Tr 111) Barber explained that O'Neill talks about an honor system, but it is very difficult for employees to even make personal appointments and that Barber was being denied health insurance benefits for five months after he was eligible. (Tr 111-112) The August 23 conversation lasted about 15 minutes. (Tr 112, 54) There is a camera in Dykstra's office. (Tr 55)

Following the August 23 meeting between Barber and Dykstra, Dykstra went to speak with O'Neill. (Tr 56) Dykstra told him that as far as he could tell, Barber did not like O'Neill and had completely soured on him. (Tr 56) Dykstra told O'Neill that in his experience, this was a situation that O'Neill needed to either address head-on with some sort of solution or just decide to move on from Barber. (Tr 56) O'Neill told Dykstra that he had similar types of issues in the past with Barber regarding "speaking up about particular things" and "particularly speaking … to other people." O'Neill told Dykstra this was Barber's "third strike for gossip." (Tr 56-57) After trying his best relay to O'Neill what was said during his conversation with Barber, Dykstra reminded O'Neill that he could check his cameras to hear and see what was said. (Tr 58) O'Neill later told Dykstra that after reviewing security footage from the camera in Dykstra's office, he decided that it was clear and he made his decision to terminate Barber. (Tr 57-58, 77, 92)

At about 7:43 p.m. on August 23, O'Neill text messaged Barber: "Hey Shay! I just wanted to connect with you. I'm looking at some video. Did you talk with Ben about me earlier today?" Barber responded by text message: "Hey, I'm with family for the weekend. We can talk at the office on Monday." O'Neill responded by text message: "Enjoy your family! I'm not sure that I want to wait until then." (GC 9) At about 9:23 p.m., Dykstra sent a quote to O'Neill by text message about Navy Seals relying on each other. (GC 12) Dykstra suggested that the employees affected by Barber's negativity could air that negativity and give Barber the option to stay and accept it. (GC 12) O'Neill responded by text message: "I'm done with the politics and discussion Expectations were clearly given to him three months ago… We cannot risk our team unity. I'm pretty sure Navy Seals don't talk negatively about their leadership and expect a promotion!" (GC 12)

D. Respondent Discharges Barber

On August 26, Barber arrived at the office and noticed that he was deactivated from some of Respondent's software systems including, Wealthbox and Microsoft Teams. (Tr 114) Believing he was being fired, Barber wanted to leave as quickly as possible and began collecting his personal items. (Tr 114) O'Neill and Potter came to Barber's office. (Tr 114) When O'Neill asked to meet with Barber, Barber told O'Neill that he would meet O'Neill after he was done packing up his items and taking them to his car. (Tr 114) O'Neill raised his voice, telling Barber "no, right now" and entered Barber's office. (Tr 114) O'Neill told Barber that he was being let go, that he was a lazy worker and did not have a self-employed mindset, and that he gossiped too much. O'Neill scoffed at the idea that Barber was interested in the office manager position. Barber stated that he was around leaders often, that he sees how teachers, coaches and leaders lead, and that O'Neill was not a leader. (Tr 116) Barber told O'Neill that while he preaches that he is a godly man, O'Neill treats his employees "like crap," that he is at the office more than he is at home, and that he uses his family to sell clients. (Tr 115, 63) Barber said that O'Neill takes pictures of toilets and sends them to Barber and coworkers to clean them. Dykstra then entered Barber's office and stated that he was willing to clean toilets. (Tr 65) Barber discussed O'Neill's "false promises" such as the annual review and raises and how it affects employees' livelihoods. (Tr 115) Barber described the health insurance as being the "bare minimum," essentially the same as having no insurance at all. (Tr 116)

O'Neill directed Dykstra to call the police. (Tr 116, 62) Barber stated that he really tried to make Respondent a good work environment where everyone would want to work and be happy. O'Neill and Barber walked to the front door and Barber told O'Neill that he truly hoped that O'Neill started treating his employees with respect and acknowledging the time that

employees give him and Respondent's business. Barber exited through the front door and placed his remaining items in the trunk of his car. (Tr 116-117) As Barber was leaving, the police arrived. (Tr 65, 116-117) Out of habit, Barber left work with his laptop and later returned it to employee Rodriguez as requested. (Tr 117-119) After Barber left, O'Neill stated to employees at a staff meeting that Barber's discharge would be a positive thing for the group and noted that this was Barber's "third strike for gossip." (Tr 67-68)

E. Employment Agreement

Respondent has maintained and enforced employment agreements with Barber and Dykstra containing the following language:

> "Confidential Information" means information about the Company and its employees, customers, and/or suppliers that is not generally known outside of the Company, that Employee learns of or has learned of in connection with employment with the Company, and that would be useful to competitors of the Company. Confidential Information includes, but is not limited to:
>
> i. Company software and software codes or coding;
>
> ii. business and employment policies and/or strategies, customer lists, customer information, customer contacts, marketing and sales methods and the targets of those methods, finances, financial plans, business plans, promotional materials, and price lists;
>
> iii. the nature, origin, composition, and development of the Company's products; and
>
> iv. the manner in which the Company provides products and services to its customers. (GC 4, 15)

F. Respondent's Defenses

O'Neill testified that in addition to the PIP issued to Barber, Respondent asserts that on about May 30, it issued Barber a written warning for passing negatives around,

disrespect, and insubordination. (0 1)[6]

O'Neill stated that in May, Barber and Hendrick were insubordinate by having conversations with other team members and telling leadership that "they're going to do their own thing." (Tr 45) O'Neill testified that during the May 23 meeting, Barber was "right along with [Hendrick], encouraging her." (Tr 215)

O'Neill testified that on August 23, Dykstra came to his office and to tell him he had a conversation with Barber that O'Neill would want to hear about it. Dykstra said that this guy obviously "does not like you, doesn't respect you or the leadership team". (Tr 224) O'Neill stated that Dykstra told him that Barber was talking "shit" about the leadership team. (Tr 46) Dykstra suggested that he should check out the video. (Tr 224) O'Neill further testified that on August 23, he looked at the timestamps on the video of the August 23 conversation between Dykstra and Barber and noted that the video was 45 minutes long. (Tr 225) O'Neill said that he listened to "maybe four minutes or so." (Tr 225) O'Neill said that he heard enough attacks by Barber against the leadership team including Barber saying "you can't trust them – they don't know what they're doing". (Tr 225) O'Neill testified he then turned the video off. (Tr 225) O'Neil stated that with respect to constructive criticism, an employee has to talk about it within the current confines of talking with your superior who can do something about that matter." (Tr 251) O'Neill made the final decision to terminate Barber on August 24, in consultation with Wills and Potter. (Tr 267, 278-279)

On July 2, 2025, Potter sent the following message to the Regional Office in support of the instant charge filed on October 11, 2024:

[6] Barber denied receiving it.

> In my stance, Shay Barber was fired for cause, for most importantly not following our core values of No Gossip. After he was given warnings in the past to not gossip and not speak negatively of others, he continued to do so. After he was gossiping to a new coworker about things he didn't like about how the company was being run, Shay was let go. (O 18)

III. CREDIBILITY

D. Barber and Dykstra's Testimony is Credible

Barber testified in complete detail and did not waiver even during a thorough cross examination. His manner was direct and matter-of-fact. .Barber's testimony was corroborated by Dykstra's on all of the salient points. While he minor differences between the testimony of Barber and Hendrick and between Barber and Dykstra's and Barber's testimonies. These individual variances support findings that each of the witnesses were credible. See, ***Campbell Electric Co.***, 340 NLRB 825, 831 fn. 12 (2003) ("variances in [the testimony of three witnesses as to the dates of meetings] were due to differing recollections rather than an intent to mislead"); ***Menlo Food Corp***., 330 NLRB 337, 349 (1999) (witnesses "mutually corroborative - save for minor details which fell within the normal range of human variation); ***Biewer Wisconsin Sawmill, Inc.***, 312 NLRB 506, 511 (1993) (recollection "differed because of human variation and differing recollection of events").

E. O'Neill's Testimony is Not Credible

O'Neill testified in a hostile, belligerent, and oftentimes non-responsive manner. He spewed vitriol about Barber, Hendrick, and the Board and appeared to be the problematic boss they described. Given his volatile personality and apparent rage, O'Neill's testimony should be discounted. There is no question that Barber challenged O'Neill's ideas and actions and that O'Neill had no tolerance for someone who did not "kiss the king's ring."

O'Neill's testimony regarding the August 23 conversation between Barber and Dykstra

should not be credited as he estimated that that he watched "maybe four minutes or so" of the video of the conversation. O'Neill could neither recall how long he listened to the conversation or what was said during the conversation. He merely testified in a conclusory manner that there were comments about not being able to trust management. Moreover, four minutes would have been ample time to hear the protected nature of the discussion between Barber and Dykstra, including Barber warning Dykstra that O'Neill sometimes pits employees against each other and that Dykstra should be careful.

IV. ARGUMENT

A. Respondent's Confidentiality Clause in Its Employment Agreement is Overbroad in Violation of Section 8(a)(1) of the Act (¶ 9 of the Complaint)

1. The Confidential Information Clause Is Overbroad Pursuant to Stericycle and Boeing

Respondent has maintained and enforced the following language in its employment agreements:

"Confidential Information" means information about the Company and its employees, customers, and/or suppliers that is not generally known outside of the Company, that Employee learns of or has learned of in connection with employment with the Company, and that would be useful to competitors of the Company. Confidential Information includes, but is not limited to:

i. Company software and software codes or coding;

ii. business and employment policies and/or strategies, customer lists, customer information, customer contacts, marketing and sales methods and the targets of those methods, finances, financial plans, business plans, promotional materials, and price lists;

iii. the nature, origin, composition, and development of the Company's products; and

iv. the manner in which the Company provides products and services to its customers. (GC 4, 15)

In ***Stericycle, Inc.***, 372 NLRB No. 113 (2023), currently establishes the test used to determine whether an employer's rules unlawfully restrict Section 7 rights. In ***Stericycle***, the Board returned to and built upon the standard established in ***Lutheran Heritage Village-Livonia***, 343 NLRB 646 (2004) for analyzing work rules. The Board established a two-step test for determining when a facially neutral work rule unlawfully restricts employees from engaging in protected activity. The General Counsel must first "prove that a challenged rule has a reasonable tendency to chill employees from exercising their Section 7 rights." ***Stericycle, Inc.***, supra at 3. This is determined by looking at the rule from the viewpoint of an employee who is "subject to the rule and economically dependent on the employer, and who also contemplates engaging in protected concerted activity." ***Id.*** If "an employee could reasonably interpret the rule to have a coercive meaning, the General Counsel will carry her burden." ***Id.*** If the General Counsel meets this burden, the rule is presumed to be unlawful, "even if a contrary, noncoercive interpretation of the rule is also reasonable." ***Id.***

Respondent may "rebut the presumption by proving that the rule advances a legitimate and substantial business interest and that the employer is unable to advance that interest with a more narrowly tailored rule." ***Ibid.***

The confidentiality clause contained in the employment agreement violates Section 7 of the Act because it requires employees to keep information regarding terms and conditions of employment confidential. Specifically, the rule requires employees to keep confidential information about Respondent and its employees that is not generally known outside of Respondent and that employees learn or learn about in connection with their employment with Respondent and that would be useful to competitors of Respondent. This language is not narrowly tailored to any specific issue. Indeed, as worded, the rule encompasses most

information at a workplace, including wages, hours, benefits, work rules, lawsuit information, and harassment claims – core subjects of Section 7 of the Act.

This type of information is by its nature not generally known outside of Respondent and would be the kind of information an employee would learn if he or she worked at Respondent. See ***Flex Frac Logistics, LLC****,* 358 NLRB 1131, 1132 (2012), enfd. 746 F.3d 205 (5th Cir. 2014) (employer rule prohibiting disclosure of confidential information, defined to include "personnel information and documents," was unlawfully overbroad). The instant rule also specifically prohibits the disclosure of "employment policies," which are by definition terms and conditions of employment and such cannot be deemed confidential. See ***Quicken Loans, Inc.,*** 361 NLRB 904 (2014), affirming 359 NLRB 1201, 1201 fn. 3 (2013) (rule unlawful that prohibited disclosure of "non-public information relating to or regarding personnel" and "personnel information including . . . handbooks") Finally, the language in the first paragraph is not narrowly tailored. For instance, Respondent could have limited confidentiality to a category like proprietary information or trade secrets and chose not to. Thus, this rule violates Section 8(a)(1) under ***Stericycle***.

2. The Board should overturn Stericycle in favor of a balanced and common-sense approach.

As noted, ***Stericycle*** currently establishes the test used to determine whether an employer's rules unlawfully restrict Section 7 rights. The General Counsel urges the Board to overturn ***Stericycle*** and return to a more balanced and common-sense approach to facially neutral workplace policies that strike the proper balance between protecting employees' Section 7 rights and safeguarding employers' legitimate business interests.

The Board is tasked with faithfully interpreting the Act by ensuring its enforcement remains within the parameters established by Congress. In this regard, the Board must strike a

careful balance to safeguard employer and employee rights and interests simultaneously, without creating unnecessary conflict between them. When evaluating facially-neutral work rules, the Board should endeavor to preserve employees' rights to engage in Section 7 activities by prohibiting workplace policies that will genuinely coerce employees while empowering employers to maintain order, adhere to legal requirements, and foster productive environments.

Instead of striking that proper balance, ***Stericycle*** encourages the reading of common workplace rules in a vacuum by adopting an excessively broad interpretation of Section 7 at the expense of congressional intent. Congress never intended for the Act to prevent employers from upholding safe and harassment-free workplaces or penalize companies for doing so. By stretching the scope of Section 7 beyond its intended boundaries—and common sense—the ruling undermines the ability of employers to establish essential policies that protect employees' safety and maintain a respectful environment.

Indeed, ***Stericycle*** fails to recognize employers' statutory and legal duties under federal and state laws to maintain safe environments, investigate allegations of harassment, uphold respectful workplace standards and safeguard confidential and proprietary information. The ***Stericycle*** framework thereby creates a dilemma by forcing employers to either comply with various legal and regulatory requirements or risk having every workplace policy challenged as potentially violative of the Act, leaving employers unable to enforce essential workplace rules without facing legal uncertainty and litigation. The ***Stericycle*** framework has made it increasingly difficult for employers to draft workplace policies with certainty, as nearly any rule may now be subject to challenge. This climate of regulatory uncertainty makes employers hesitant to uphold essential workplace standards for fear of having to litigate whether those standards could withstand Section 7 scrutiny under the broadest possible interpretation. Such

uncertainty discourages investment while encouraging litigation and falls particularly hard on small businesses that may lack the resources to secure labor counsel.

For these reasons, the General Counsel urges the Board to overturn ***Stericycle*** in favor of a more balanced approach that effectuates congressional intent and promotes industrial peace.

B. Respondent's Instruction to Employees To Not Voice their Concerns with Other Employees is in Violation of Section 8(a)(1) of the Act (¶ 6 of the Complaint)

On May 24, Respondent promulgated an overly broad rule by instructing employees not to discuss workplace issues with each other thereby unlawfully restricting employees from discussing terms and conditions of employment with each other. (GC 5) "To determine whether a statement is an unlawful coercive threat under Section 8(a)(1), the statement is assessed in the context in which it is made and whether it tends to coerce a reasonable employee." ***Blue School***, 373 NLRB No. 120, at slip op. at 3 (2024), citing ***Roemer Industries***, 367 NLRB No. 133, slip op. at 6 (2019), enfd. mem. 824 Fed.Appx. 396 (6th Cir. 2020). It is well established that employees have the right to talk to each other about a union or about their terms and conditions of employment. ***Republic Aviation Corp v. NLRB***, 324 U.S.793, 802-804 (1945); ***SNE Enterprises, Inc.***, 347 NLRB 472 (2006). Thus, an employer cannot lawfully instruct employees not to discuss issues relating to their terms and conditions of employment. ***Westside Community Health Center***, 327 NLRB 661, 666 (1999). Moreover, an employer cannot lawfully instruct employees to bring concerns about terms and conditions of employment to the employer and not to other employees. See ***AFSCME Local 5***, 364 NLRB 837, 839 (2016); ***Affinity Medical Center***, 362 NLRB 654, 672 fn. 41 (2015); ***Valley Hospital Medical Center***, 351 NLRB 1250,1254 (2007), enfd. sub nom. ***Nevada Service Employees Union, Local 1107***, 358 Fed. Appx. 783 (9th Cir. 2009); and ***Kinder-Care Learning Centers***, 299 NLRB 1171, 1171 fn. 1 (1990); ***Guardsmark, LLC***, 344 NLRB 809 (2005), enfd. in relevant part 475 F.3d 369 (D.C. Cir. 2007). Finally, even

when a directive against talking is facially lawful, it is unlawful if promulgated in response to protected concerted activities ***Lutheran Heritage-Livonia***, 343 NLRB at 646-647. ***Laurus Technical Institute***, 360 NLRB 1155, 1162-1164 (2014) (citing overly broad no-gossip policy, employer unlawfully discharged employee for speaking to coworkers and managers not in her chain of command about regarding terms and conditions of employment).

Here, in response to Hendrick's request to discuss O'Neill's conduct with other employees present at the staff meeting, O'Neill told employees that they were only to discuss work concerns with their supervisor and were not permitted to discuss terms and conditions of employment with fellow employees:

> " ... It will not be discussed at our team meeting as that is part of the issue. You do not have the authority to tell Michael or I how to handle these matters. We are all for constructive feedback, but you always voice concerns up. . . Not laterally. You need to respect him and I in that matter. That is final. You need to be able to talk with and communicate with your team lead to be part of our team,,,that isn't negotiable. Please do not message on this thread regarding that or you'll be removed from it., It's toxic, and we will not stand for it." (GC 5)

Within his message from O'Neill to Hendrick, O'Neill repeatedly informed employees that they were not to discuss workplace issues with each other. First, O'Neill told employees that "you always voice concerns up . . . Not laterally." Next, he noted "[t]hat is final. … You need to be able to talk with and communicate with your team lead to be part of our team to be part of our team." Third, he emphasized that employees should not message about this matter in the "thread" (which included other employees) "or you'll be removed from it." Finally, O'Neill stated that such discussions were "toxic" and "we will not stand for it."

Moreover, the prohibition on permitting employees from discussing workplace matters was not unusual at Respondent. In this regard, O'Neil's call log to Josh Wills noted: "I explained that [Barber] should bring matters up to him and no one else." (O 2, 5/24 note per call to Josh

Wills)) Respondent espoused also had a "no gossip" value and O'Neil indicated that he believed that it applied to Barber's conduct at the May 23 staff meeting. . (O 2, 5/23 note per call to Jacob O'Hearn) The "no gossip" value which states "[w]e pass negatives up and positives around"[7] echoes O'Neill's prohibition about employees talking to each other about working conditions. (O 16) Thus, Respondent's culture, not just randomly from O'Neill's actions, prohibited employees from discussing workplace issues with each other.

Similarly, with respect to the issue of constructive feedback, O'Neill testified that employees "have to share that within the correct confines of talking with your superior who can do something about that matter." (Tr 251) In essence, O'Neill "doubled down" on the premise that employees should not be discussing workplace matters with each other.

While it might be true that a client was physically present at Respondent's facility, the client was not included in the internal Teams message. As noted above, Respondent could have continued the discussion on the internal Teams message platform (GC 5), arranged a time to discuss the concerns of Hendrick and of other employees in a group setting, or stopped the discussion altogether, which is what it did. However, Respondent went too far by prohibiting employees from speaking with each other about their terms and conditions of employment.

O'Neill's May 24 statement to Hendrick not only clearly directed Hendrick and the other employees on the Teams chat to take her concerns to a lead or supervisor instead of to other employees, but it was also made in direct response to Hendrick's protected activity. ***Lutheran Heritage Village – Livonia***, supra at 646-647. O'Neill's Teams statement is clearly an unlawful directive under Section 8(a)(1) of the Act.

[7] This value is not alleged as a violation of Section 8(a)(1).

C. Respondent's Discharge of Shay Barber Due to his Protected Concerted Activities was in Violation of Section 8(a)(1) (¶ 8 of the Complaint)

1. Legal standard for Adverse Employment Actions

The legal standard for evaluating whether an adverse employment action violates the Act is generally set forth in ***Wright Line***, 251 NLRB 1083, 1089 (1980), enfd., 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). To establish that an employer's conduct has violated the Act, ***Wright Line*** requires the General Counsel to initially prove by a preponderance of the evidence that the employee's protected activity was a motivating factor in the employer's decision to take the adverse employment action. ***Wright Line***, 251 NLRB at 1089. Once that is established, the burden of persuasion shifts to the employer to prove that it would have taken the same adverse action even in the absence of the protected activity. ***Id.*** An employer must not only establish a legitimate reason for its action, but must persuade, by a preponderance of the evidence, that it would have taken the same action even in the absence of the employee's protected activity. ***Whitehawk Worldwide***, 371 NLRB No. 122, slip op. at 16 (2022).

The General Counsel's overall burden of persuasion is identical to its initial burden under ***Wright Line***. See ***Manno Electric,*** 321 NLRB 278, 280 fn. 12 (1996), enfd. mem. 127 F.3d 34 (5th Cir. 1997). In meeting its burden of persuasion, the General Counsel must establish that the discriminatee engaged in protected activity, that the employer had knowledge of this activity, and that the employer carried out the adverse employment action because of the protected activity. The causal link between the protected activity and the adverse employment action, however, may be sustained with circumstantial evidence. ***Gavilon Grain, LLC,*** 371 NLRB No. 79, slip op. at 10 (2022)*;* ***Medic One, Inc.***, 331 NLRB 464, 475 (2000); ***Abbey's Transportation Services***, 284 NLRB 698, 701 (1987), enfd. 837 F.2d 575 (2d Cir. 1988).

With respect to knowledge, it is "well established that, in the absence of direct evidence,

an employer's knowledge of an employee's union activities may be proven by circumstantial evidence from which a reasonable inference may be drawn." ***Pan-Oston Co.,*** 336 NLRB 305, 308 (1998); ***Abbey's Transportation Services***, supra. Evidence of suspicious timing, false reasons given in defense, disparate treatment of discriminatees, departure from past practice, and the failure to adequately investigate alleged misconduct all support such inferences.

Circumstantial evidence of disparate treatment of the discriminatee and Respondent's shifting defenses constitute evidence of animus. See ***BS&B Safety Systems, LLC***, 370 NLRB No. 90, slip op. at 1 (2021); ***Lucky Cab Co.***, 360 NLRB 271, 274-275 (2014); ***Medic One, Inc.***, supra at 475, ***Adco Electric Incorporated***, 307 NLRB 1113, 1128 (1992), enfd. 6 F.3d 1110 (5th Cir. 1993) (analysis in ALJD); ***Naomi Knitting Plant,*** 328 NLRB 1279, 1283 (1999); ***Visador Co.***, 303 NLRB 1039, 1044 (1991) (analysis in ALJD). Finally, the Board will infer an unlawful motive or animus where the employer's action is "baseless, unreasonable, or so contrived as to raise a presumption of unlawful motive." ***J.S. Troup Electric, Inc.***, 344 NLRB 1009, 1015 (2005) (citing ***Montgomery Ward,*** 316 NLRB 1248, 1258 (1995); and ***ADS Electric Co.,*** 339 NLRB 1020, 1023 (2003).

2. Barber Engaged in Protected Concerted Activity when he Spoke to Dykstra

During their August 23 discussion, Barber and Dykstra were engaged in protected concerted activities. In this regard, Barber warned Dykstra about issues with working with O'Neill including the annual review and compensation structure as well as how O'Neill turns coworkers against each other.

"Employees have a right to discuss among themselves, and with the public, information about their terms and conditions of employment for the purpose of mutual aid and protection." ***Motor City Pawn Brokers***, 369 NLRB No. 132, slip op. at 6 (2020) (citing ***Eastex,***

Inc. v. NLRB, 437 U.S. 556, 565-566 (1978)). Concerted activity directed toward supervisory conduct, such as "rude, belligerent, and overbearing behavior" which directly affects the employees' work, constitutes protected activity under the Act. ***Arrow Electric Co***., 323 NLRB 968, 970 (1997), enfd, 155 F.3d 762 (6th Cir. 1998).

Concerted activity focuses on the "*goal*" of the activity: "Whether the employee or employees involved are seeking to 'improve terms and conditions of employment or otherwise improve their lot as employees.'" ***Fresh & Easy Neighborhood Market, Inc.***, 361 NLRB 151, 153 (2014) (emphasis in original) (quoting ***Eastex, Inc. v. NLRB***, 437 U.S. 556, 565 (1978)). The Board has held that "[w]hether the employee is engaged in concerted activity is a factual one based on the totality of the record evidence." ***Miller Plastic Products, Inc.***, 372 NLRB No. 134 at slip op at 10 (2023), citing ***Meyers Industries***, 281 NLRB 882 (1986) (***Meyers II***), affd. sub nom. ***Prill v. NLRB***, 835 F.2d 1481 (D.C. Cir. 1987), cert. denied 487 U.S. 1205 (1988). Employees are engaged in protected concerted activity when they raise "truly group complaints." *Id.* citing ***Myers II***, supra.

Giving advice to another employee about terms and conditions of employment is concerted activity. ***Whitehawk Worldwide***, 371 NLRB No. 122 (2022) (Discharge of Angel Aniles in ALJD) The Board has held that warning a coworker about employment matters is protected concerted activity. See, ***Component Bar Products, Inc.***, 364 NLRB 1901 fn. 1, 1911 (2016) (employee engaged in protected concerted activity when he warned another employee that his job was in jeopardy); ***Tracer Protection Services, Inc.***, 328 NLRB 734 (1999) (warning an employee that his job was at risk was concerted activity). See also ***Hoodview Vending Co.,*** 362 NLRB 690 n.1 (2015) (***Hoodview II***) (discussions of job security, like wages, are inherently concerted; employer violated Section 8(a)(1) by discharging employee for discussing

another employee's job security) Dykstra and his disbelief, annoyance or anger about what Barber said does not make their conversation any less protected. ***Ryder Transportation Services***, 341 NLRB 761, 761 (2004).

Not only are Barber's warnings to Dykstra about issues with working at Respondent and specifically with O'Neill protected, but their discussion also addressed how to improve the annual review and wage structure. This was not a gripe session by Barber. Rather, Barber was trying to help Dykstra, not himself. Barber was prompted to talk to Dykstra because he heard O'Neill informing Dykstra that Rodriguez was blaming an error on Dykstra. Barber was working to improve working conditions at Respondent when he talked to Dykstra on August 23 as well as when he spoke to coworkers in May before the staff meeting. In addition, Dykstra shared his plans for better compensation for Respondent's employees. (Tr 103) Thus, Barber and Dykstra were each discussing wages and terms and conditions of employment, subjects that they had a right to discuss.

3. O'Neill was Aware of Barber's Protected Concerted Activities and Demonstrated Animus Toward Them

As noted, Barber and Dykstra were engaged in protected activities in their August 23 discussion about workplace conditions. O'Neill was aware of their discussion because: (1) Dykstra told him about their discussion; (2) O'Neill admits that he watched the video of their discussion; and (3) O'Neill's denial of watching the entire video is not credible.

As described in the Credibility section of this brief, O'Neill asserts that he only watched "maybe four minutes or so" of the video. Assuming arguendo that O'Neill's testimony about watching four minutes of the video is credited, his admission to seeing four minutes of the discussion between Barber and Dykstra included Barber warning Dykstra about O'Neill pitting employees against each other and how O'Neill reacted to changing Respondent's compensation

system establishes that O'Neill was fully aware of the protected concerted nature of their discussion. In fact, it was O'Neill who expressed that Rodriguez blamed Dykstra for an error that caused Barber to come into Dykstra's office. Importantly, O'Neill admitted that during the Barber-Dykstra conversation, he heard the following attacks, "you can't trust them – they don't know what they're doing." (Tr 225) This language is a direct reference to Barber's concerns about how O'Neill pitted employees against each other. CGC asserts that even taking O'Neill at his word, four minutes would have been sufficient for O'Neill to know and understand what they were discussing, particularly when the conversation itself lasted between 10 and 20 minutes.

Moreover, O'Neill previously admitted that he was discharging Barber due to the criticism that Barber was giving about company policies. In this regard, in Respondent's position statement, O'Neill admitted that Barber and Dykstra were discussing employment matters and that it was that conversation that motivated him to discharge Barber:

> The situation became untenable on August 23, 2024, when a new employee reported that Mr. Barber had taken an extended break to *disparage the company, undermine leadership, and discourage adherence to company policies.* Following consultation with our leadership team, the decision was made to terminate his employment. (GC 10, emphasis added)

In addition, in response to Dykstra's suggestions to O'Neill work with Barber, O'Neill responded: "I'm done with politics and discussion Expectations were clearly given to him three months ago… We cannot risk our team unity I'm pretty sure Navy Seals don't talk negatively about their leadership and expect a promotion!" (GC 12) O'Neill's response is telling regarding his knowledge of employees' protected concerted activities and his hostility toward such activities. First, Respondent continually highlighted Barber's lack of respect. In addition, given the timing of O'Neill's response to the May 23 staff meeting, there is no doubt that O'Neill's reference to "expectations" being given three months prior was related to Barber's conduct in standing up for Hendrick at the May 23 meeting, which

resulted in Respondent's issuance of the PIP to Barber. Clearly, O'Neill remembered and resented Barber's past protected concerted activity. In his out-of-control testimony, O'Neill repeatedly expressed concern about respect, including "no gossip." O'Neill appeared to be very sensitive about criticism of any kind, including employees' protected concerted activities. Additionally, O'Neill mentioned risking "team unity" in connection with referencing Barber speaking negatively about O'Neill. This is an admission that O'Neill was aware of what was said, specifically about Barber's statements about O'Neil's conduct. It appears that risking team unity to O'Neil is challenging how he runs the office and how he pays his staff, both are terms and conditions of employment. Finally, O'Neill's Navy Seals comment about not talking negatively about leadership belies O'Neil's actual concerns that Barber's protected concerted activity was related to O'Neill's policies and conduct and that criticism of Respondent by employees was not to be tolerated.

In providing the reason he gave for Respondent discharging Barber, Lead Advisor Potter confirmed Respondent's knowledge and intolerance for criticism:

> In my stance, Shay Barber was fired for cause, for most importantly not following our core values of No Gossip. After he was given warnings in the past to not gossip and not speak negatively of others, he continued to do so. After he was gossiping to a new coworker about things he didn't like about how the company was being run, Shay was let go. (O18)

The warning given to Barber previously by Respondent was in response to his protected activity in speaking up for Hendrick. Potter also noted the subject matter of Barber's concerns that he was sharing with Dykstra – "things he didn't like about how the company was being run." How "the company was being run" included what Barber and Dykstra discussed: the annual review and pay structure and how O'Neill pitted employees against each other and was resistant to change.

5. Respondent's Defenses are not Supported by the Evidence

Respondent's assertion that O'Neill watched the video for four minutes or so is not supported by the evidence. First, Barber testified that he thought they spoke for about 10 to 15 minutes, no more than 20, and Dykstra likewise thought the conversation lasted about twenty minutes. Second, O'Neill did not mention the length of the discussion when he texted Barber on August 23. (GC 9)

Respondent may argue that Barber's conduct at the time of his discharge prevents the ALJ from finding that his discharge was a violation of the Act. While the discussion was heated between Barber and O'Neill, discharge proceedings are often emotional and tempers flare. Such conduct does not disqualify an employee from reinstatement and backpay unless it is "so flagrant as to render the employee unfit for further service, or threat to efficiency in the plant." ***Hawaii Tribune Herald***, 356 NLRB 661, 662 (2011). Here, there were no threats; both Barber and O'Neill were merely expressing their frustration.

O'Neill expressed a litany of concerns regarding Barber's performance, including considering discharging him in May. First, as noted by the ALJ at the hearing, it was not until Barber had the August 23 conversation with Dykstra that Respondent actually took steps to discharge him. (Tr 183) Second, some of the issues highlighted by Respondent appeared to be animus regarding Barber's protected concerted activities including the PIP and the purported discipline as well as the previous write-up issued to Barber for engaging in protected concerted activity.[8] While Respondent asserts that it likewise issued Barber's PIP to him based on

[8] These "shortcomings" included his protected concerted activity when he brought up O'Neill's treatment of Hendrick. (O 2). Items dated May 23-24, describing Barber's support for Hendrick as "hijacking" a meeting and "uncalled for" for him to bring it up at a meeting. Josh Wills statement that Barber should bring up issues to him and no one else.

performance issues, it failed to list any performance deficiencies[9]. Rather, it lists following core values and raising concerns with professionalism. CGC submits that Respondent issued Barber's PIP to him in retaliation for his protected concerted activity related to supporting a coworker trying to remedy O'Neill's abusive conduct during a staff meeting. (GC 6) Third, Respondent's call log reflecting Barber's asserted deficiencies is insufficient to show that there were actual performance issues as there was no point of reference. In that regard, Respondent did not enter into evidence any other similar call logs referencing other employees that would indicate how many and the nature of the calls were noted for them.

It is respectfully submitted that the ALJ should find that Charging Party Shay Barber engaged in protected activities; that Respondent was aware of Barber's activities; that these activities were a motivational factor and a causal connection to Barber's discharge; and that Respondent would not have discharged Barber in the absence of those activities. CGC submits that Respondent failed to prove that it would have discharged Barber in the absence of his protected activities. Thus, Respondent has violated Section 8(a)(1) of the Act by discharging Barber.

[9] Barber's PIP is in contrast to PIP issued to Jacob Ahearn, which actually reflects issues about work performance. (GC 16)

V. CONCLUSION

Based on the foregoing reasons and the overwhelming record evidence considered as a whole, CGC respectfully submits that Respondent has violated Section 8(a)(1) of the Act as alleged in the Complaint by maintaining and enforcing an overbroad confidentiality rule in its employment agreement; promulgating an overly broad rule by instructing employees not to discuss workplace issues with each other; and by discharging Charging Party Shay Barber. The ALJ should so find and recommend that the Board fashion an appropriate remedy that would require Respondent to rescind the unlawful rules related to instructing employees not to discuss workplace issues with each other and related to the confidentiality; reinstate and make whole Barber; expunge his discharge from Respondent's records; cease and desist from such unlawful conduct; and post an appropriate physical and electronic Notice to Employees at its facilities, a proposed copy of which is attached. The ALJ should order such other relief as may be necessary and appropriate to effectuate the policies and purpose of the Act.

Dated at Detroit, Michigan this 26th day of August, 2026.

/s/ Patricia A. Fedewa
Patricia A. Fedewa
Counsel for the General Counsel
National Labor Relations Board,
Region 7 477 Michigan Avenue
Room 05-200
Detroit, Michigan 48226-2569
Tel: (313)335-8053
Fax: (313) 226-2090
Email: patricia.fedewa@nlrb.gov

Appendix

(To be printed and posted on official Board notice form)

THE NATIONAL LABOR RELATIONS ACT GIVES YOU THE RIGHT TO:

- Form, join, or assist a union;
- Choose a representative to bargain with us on your behalf;
- Act together with other employees for your benefit and protection;

WE WILL NOT interfere with, restrain, or coerce you in the exercise of the above rights.

YOU HAVE THE RIGHT to engage in protected activities with your fellow employees and others on issues that concern your wages, hours and working conditions, and **WE WILL NOT** do anything to interfere with that right.

YOU HAVE THE RIGHT to discuss your wages, hours and working conditions with your fellow employees and others, and **WE WILL NOT** do anything to interfere with that right.

YOU HAVE THE RIGHT to freely bring issues and complaints regarding wages and/or other terms and conditions of employment to us on behalf of yourself and other employees and **WE WILL NOT** do anything to interfere with your exercise of that right.

WE WILL NOT maintain work rules that restrict or interfere with your rights to engage in protected concerted activities related to your wages, hours, or other terms and conditions of employment, including the following rules maintained, and/or previously maintained, in our Employment Agreement:

> "Confidential Information" means information about the Company and its employees, customers, and/or suppliers that is not generally known outside of the Company, that Employee learns of or has learned of in connection with employment with the Company, and that would be useful to competitors of the Company. Confidential Information includes, but is not limited to:
>
> 1.Company software and software codes or coding;
>
> 11.business and employment policies and/or strategies, customer lists, customer information, customer contacts, marketing and sales methods and the targets of those methods, finances, financial plans, business plans, promotional materials, and price lists;
>
> 111. the nature, origin, composition, and development of the Company's products; and

iv. the manner in which the Company provides products and services to its customers.

WE WILL NOT maintain work rules that restrict or interfere with your rights to engage in protected concerted activities related to your wages, hours, or other terms and conditions of employment, including the following rules maintained, and/or previously promulgated on Microsoft Teams:

"…It will not be discussed at our team meeting as this is part of the issue. You do not have the authority to tell Michael or I how to handle these matters. We are all for constructive feedback, but you always voice concerns up…Not Laterally. You need to respond him and I in that matter. That is final. You need to be able to talk with and communicate with your team lead to be part of our team. That isn't negotiable. Please do not message on this thread regarding that or you'll be removed from it. It's toxic, and we will not stand for it."

WE WILL NOT suspend you, discharge you, or otherwise discriminate against you in retaliation for discussing wages, hours, or any other terms and conditions of employment with other employees so as to discourage you from engaging in such activities.

WE WILL NOT suspend you, discharge you, or otherwise discriminate against you in retaliation for bringing complaints to us regarding wages, hours, or any other terms and conditions of employment on behalf of yourself and other employees so as to discourage you from engaging in such activities.

WE WILL NOT in any like or related manner discriminate against you in regard to your hire, tenure or terms and conditions of employment so as to discourage your engaging in concerted activities for the purpose of mutual aid and protection regarding your wages, hours, and working conditions, including bringing issues and complaints to us on behalf of yourself and other employees.

WE WILL NOT in any like or related manner interfere with your rights under Section 7 of the Act.

WE WILL rescind in writing the overly broad work rules listed above, which restrict your rights to discuss your wages, hours, and working conditions, or otherwise restrict your rights guaranteed in Section 7 of the National Labor Relations Act, and furnish you with inserts for your current Employment Agreement that advise you that the unlawful rules listed above have been rescinded and will be given no effect or **WE WILL** publish and distribute to you revised Employment Agreements that do not contain the unlawful rules, and **WE WILL** remove these rules from all places where physically or electronically maintained, and notify you in writing that we have done so and that the unlawful rules will not be given effect or used against you in any way.

WE WILL make Shay Barber whole for any loss of wages and other benefits which he lost because of his discharge, including any direct or foreseeable pecuniary harms suffered, plus interest computed in accordance with current Board policy.

WE WILL compensate Shay Barber for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and

WE WILL file with the Regional Director for Region 7, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar years.

WE WILL remove from our files all references to the discharge Shay Barber and **WE WILL** notify him in writing that this has been done and that the discharge will not be used against him in any way.

WE WILL file with the Regional Director of Region 7 a copy of Shay Barber's W-2 form reflecting the backpay award.

O'Neill Asset Management, LLC
(Employer)

Dated: _____ **By:** _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. We conduct secret-ballot elections to determine whether employees want union representation, and we investigate and remedy unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below or you may call the Board's toll-free number 1-844-762-NLRB (1-844-762-6572). Callers who are deaf or hard of hearing who wish to speak to an NLRB representative should send an email to relay.service@nlrb.gov. An NLRB representative will email the requestor with instructions on how to schedule a relay service call.

Telephone:
Hours of Operation:

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the above Regional Office's Compliance Office

Certificate of Service

I certify that on the 26th day of August 2026, I electronically served a copy of **COUNSEL FOR THE GENERAL COUNSEL'S BRIEF TO THE ADMINISTRATIVE LAW JUDGE** on each of the following parties:

Cameron Ritsema, Esq.
Counsel for Respondent
critsema@bodmanlaw.com

Shay Barber
Charging Party
shay@sbarberproperties.com

/s/ Patricia A. Fedewa
Patricia A. Fedewa
Counsel for the General Counsel
National Labor Relations Board
Seventh Region
477 Michigan Ave. – Room 05-200
Detroit, MI 48226-2569
(313) 335-8050
Patricia.fedewa@nlrb.gov